BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

DANIEL D. HELMER	)	
Claimant	)	
V.	)	
	)	
SINCLAIR MASONRY, INC.	)	Docket No. 1,070,613
Respondent	)	
AND	)	
	)	
FARMINGTON CASUALTY COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and insurance carrier (respondent), through Vincent A. Burnett, requested review of Administrative Law Judge William G. Belden's July 22, 2016 Post-Award Medical Award (Award). Roger A. Riedmiller appeared for claimant.

This is a post-award proceeding for medical benefits. The case has been placed on the summary docket for disposition without oral argument. The record on appeal is the same as that considered by the judge and consists of the March 23, 2015 settlement hearing transcript and exhibits thereto, the August 26, 2015 post-award hearing transcript, the July 20, 2016 post-award hearing transcript and exhibits thereto, in addition to all pleadings contained in the administrative file.

ISSUE

Claimant fell from a ladder while working for respondent on September 13, 2010. He incurred significant bilateral lower extremity injuries requiring multiple surgeries. Prior to his accident, claimant had preexisting low back pain for which he took pain medication.

The parties settled the claim on March 23, 2015. The parties specifically reserved the issue of whether claimant's hydrocodone use was related to his accidental work injury or his preexisting lumbar condition. In addressing this issue, the judge granted claimant's request for post-award medical treatment and authorized a doctor to prescribe and monitor claimant's oral pain medication from March 23, 2015, and ongoing.

On appeal, respondent argues claimant's need for hydrocodone is due to his preexisting chronic pain. Respondent asserts claimant's accident did not cause an aggravation of his preexisting lumbar condition and his medication dosage is simply the same now as it was before the work injury. Claimant maintains the Award should be affirmed and argues the preponderance of the evidence supports the judge's conclusions.

The sole issue is: is claimant's opioid pain medication reasonable and necessary to cure or relieve the effects of his work-related accidental injury?

FINDINGS OF FACT

Prior to his accidental injury, claimant had low back pain for which he saw Richard Varner, D.O., his primary care physician,[1] in addition to a chiropractor. Along with other treatment, Dr. Varner prescribed claimant pain medication, including hydrocodone.[2] Such prescriptions were regularly filled at pharmacies starting in 2005 and continuing at the same dosage after the September 13, 2010 accidental injury.[3]

Claimant worked for respondent as a bricklayer and stone mason for five or six years. Claimant testified his chronic back pain stemmed primarily from his work duties, including heavy lifting and constant bending and twisting, including lifting 300 95-pound concrete blocks over his head in a day, building walls and carrying scaffolding, among other job duties.

On September 13, 2010, claimant was working at the top of an extension ladder. He testified his head was at the level of a third-floor window. The ladder slipped and claimant fell, landing in a standing position on a concrete surface and being forced into deep knee bends. Claimant sustained multiple fractures to both feet[4] and underwent 13 surgeries, including placement of bone grafts and hardware, under the care of Michael Tilley, M.D., his authorized treating physician. Dr. Tilley prescribed hydrocodone for pain relief. When Dr. Tilley discharged claimant from treatment, management of his pain medication was transferred to Dr. Varner, who continued prescribing hydrocodone.

Claimant never returned to work for respondent. Claimant testified he had constant bilateral lower extremity pain ever since his accident and was unable to walk for over one year post-accident. He denied going to a chiropractor for his low back after his accident. Claimant testified his back symptoms improved, he no longer had back pain and he no longer needed to take hydrocodone for his back because he stopped his physical job as a mason. While he continued to have the hydrocodone prescription filled, claimant testified he did not take all of the pills, only taking two to four pills per day, and he gave the remaining medication to his father and coworkers. Claimant testified he never told Dr. Varner he was giving away the medication because Dr. Varner never asked and claimant never volunteered such information to the doctor.

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[1] Either claimant or his father, or both, did tenant farming on land owned by Dr. Varner. Respondent argues Dr. Varner's credibility may be affected as a result.

[2] Hydrocodone is a generic term. Lortab and Norco are brand names used in this case.

[3] P.A.H. Trans. (July 20, 2016), Resp. Ex. C and D.

[4] Claimant testified he broke every metatarsal bone and numerous other bones in his feet.

Claimant, at his attorney's request, saw George Fluter, M.D., on September 24, 2014.[5] At the post-award hearing, claimant denied telling Dr. Fluter he had back pain before testifying he may have had some back problems at that time, such as a flare-up from sleeping wrong. Claimant denied ongoing back problems requiring medication. He testified his foot pain decreases when he takes hydrocodone and increases when he forgets to take medication or the medication wears off. He testified he takes five to six hydrocodone pills per day for his foot pain, about twice as much as before the accident.

On October 14, 2014, Dr. Varner issued a letter stating:

> . . . Mr. Helmer was on medication-specifically Hydrocodone 7.5's or 10's prior to the injury of 09-13-2010. At that time he was taking pain medication for chronic back pain. Immediately after his injury his pain management has been controlled by Kansas University Medical Center physicians. I am not aware of the medications or dosages.
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> At the present he is taking Hydrocodone for the bilateral foot pain secondary to his work injury of 09-13-10.[6]

By the time of the March 23, 2015 settlement, respondent incurred over $400,000 in bills associated with treatment stemming from claimant's accidental work injuries.

On April 30, 2015, claimant saw Chris Fevurly, M.D., at respondent's request. Dr. Fevurly noted claimant had chronic low back pain since 1983. The doctor noted claimant fell 15-20 feet in his accident. Claimant complained of bilateral foot pain, in addition to low back pain, which claimant indicated was better after stopping work. On physical examination, claimant could not toe walk, heel walk or squat. Claimant's gait was antalgic and slow. His low back was tender without spasm and he had relatively preserved lumbar range of motion. Dr. Fevurly diagnosed claimant with bilateral foot fractures and chronic low back pain with opiate dependency for one to two decades prior to September 13, 2010. Claimant told Dr. Fevurly he gave some of his pain pills to his father and coworkers before his work injury. According to claimant, his need for hydrocodone was on account of his feet, not his low back. Dr. Fevurly's report stated:

> The claimant admits that he used the Lortabs 10/325 daily for chronic low back pain before the fall on 9/13/10 but reports his personal usage of Lortabs was not as much then (i.e., before 9/13/10) as is required now for his bilateral foot pain. Be that as it may be, there can be no dispute that his current prescription for Lortabs is the same today as it was prior to 9/13/10.

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[5] Dr. Fluter's report is not in evidence. K.S.A. 44-519 precludes a medical report from coming into evidence absent a physician's testimony. See *Roberts v. J. C. Penney Co.*, 263 Kan. 270, 278, 949 P.2d 613 (1997); *Meza v. Nat'l Beef Packing Co., LP*, No. 108,768, 2013 WL 4404258 (Kansas Court of Appeals unpublished opinion filed Aug. 16, 2013), *rev. denied* 299 Kan. ___ (2014).

[6] P.A.H. Trans. (July 20, 2016), Cl. Ex. 2.

. . .

> It is anticipated that there will be a chronic need for opiate pain medicines directed to his chronic pain complaints (as has been the case for many years both prior to and after the work event on 9/13/10).[7]

In a July 6, 2015 letter, Dr. Varner stated:

> It is true that [claimant] took Norco in the past for lumbar disc issues but his low back is no longer a factor in his pain management due to his markedly decreased activity level secondary to his industrial injury and catastrophic feet injuries.[8]

The judge ordered claimant to be examined by Terrence Pratt, M.D. The evaluation occurred on February 9, 2016. Claimant complained of continuous aching, burning and pain in both feet, with intermittent swelling, but denied current low back symptoms. The doctor was aware that claimant developed chronic low back pain in high school. Claimant told Dr. Pratt that he started using hydrocodone in 2006 and took one and one-half tablets per day until the 2010 accident and he gave excess medication to his father and coworkers. According to claimant, his low back symptoms resolved after he stopped working subsequent to his accident. Dr. Pratt's examination did not elicit pain complaints from claimant on palpation of his lumbosacral region. Claimant was unable to move his ankles (no inversion, eversion or dorsiflexion), except for 16° of plantar flexion bilaterally, as well as having minimal movement of his toes. His gait was slow and antalgic.

Dr. Pratt's relevant diagnoses included: (1) a history of complex involvement bilateral distal lower extremities with fractures and dislocations; (2) status post multiple procedures including arthrodesis and subsequent procedure for hardware failure; and (3) history of chronic low back pain with degenerative disk disease and reported disc protrusion and annular tears. Dr. Pratt indicated claimant will require future medical treatment for the work-related injuries, including a possible surgical consultation if his symptoms worsen and continued use of compression stockings. Dr. Pratt also indicated claimant will require ongoing medication and stated:

> . . . He is also utilizing analgesics, Lortab 10 mg up to five per day per his report. Of interest, he reports that he was utilizing one to one and a half tablets before the distal lower extremity involvement and now three to five tablets per day. He is not necessarily a reliable historian in relationship to his use of medications. He reports that he was receiving more medications than he was actually utilizing for a number of years, at least from 2006 to 2010, but he would give medications to his father and coworkers. The records do document that he received similar amounts of

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[7] *Id.*, Resp. Ex. B at 8.

[8] *Id.*, Cl. Ex. 1.

> medications preexisting the reported events or in August 2010 and after the 2010 event or in August 2014. His amounts and possible use of the medication have not changed significantly pre and post the reported event. I could not state to a reasonable degree of medical certainty whether he was actually utilizing the medications or providing medications for other individuals. I can state with certainty that his current use of hydrocodone has not exceeded his preexisting use. He does not report any additional medications in relationship to discomfort, but it is clear that he is receiving medications, whether this is for preexisting needs unrelated to the event or for the distal lower extremity symptoms, I could not state with a reasonable degree of medical certainty. He reported that he has had resolution of the lumbosacral symptoms after stopping activities. I could not relate lumbosacral involvement to his September 2010 event. He did report to Dr. Fevurly lumbosacral symptoms and had tenderness bilaterally in 2015 and Dr. Fluter in 2014 noted back pain. Today he denied any low back pain and denied any discomfort to palpation of the lumbosacral region. There was a decrease in extension which can be consistent with his history of degenerative disk disease.
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> In summary, he requires compression stockings, and potential physician reassessment for the distal lower extremity involvement due to the complex involvement with potential for developing degenerative changes. He also requires medications, but his total use of medications has not changed when comparing use prior to the 2010 event to his current use of medications based on prescriptions that have been provided. I would be happy to address any additional issues.[9]

After the post-award medical hearing, the judge ordered Dr. Varner authorized to prescribe and monitor claimant's oral pain medication from the date of the March 23, 2015 settlement. The judge found:

- Dr. Varner attributed claimant's hydrocodone use to his bilateral foot pain.
- "Dr. Fevurly thought Claimant would require ongoing medications on account of the pain Claimant experienced from the work-related injuries, but at the same dosage and frequency as before the work-related accident."[10]
- "Dr. Pratt also thought Claimant would require ongoing medication to address the pain from the work-related injuries, but also thought Claimant's total use of medication would not exceed Claimant's pre-injury usage."[11]

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[9] *Id.*, Resp. Ex. A at 6-7.

[10] ALJ Award at 2.

[11] *Id.* at 3.

The judge cited two Board cases for the proposition that post-award medical treatment may be awarded where the treatment is needed, in part, to address an injured employee's work injury, as well as personal conditions.[12] The judge concluded:

> [A]ll the medical evidence states Claimant requires the use of Hydrocodone to cure or to relieve the effects of the work-related lower extremity injuries. . . . Claimant needed Hydrocodone at the same dosage and frequency before the work-related accident, but Claimant's need pre-accident is irrelevant. Although Claimant's testimony that his prior back condition resolved is contradicted by his examining physician, and Claimant's admitted intentional misuse of Hydrocodone defies credulity, under the version of the Kansas Workers Compensation Act in effect on the date of accident, and its interpretive Board decisions, Claimant need only prove the medication will cure or relieve the effects of the work-related injuries. Dr. Varner, Dr. Fevurly and Dr. Pratt also confirmed the medication prescribed by Dr. Varner will cure or relieve the effects of the work-related injuries. Therefore, Claimant's request for post-award medical must be granted.[13]

Respondent appealed.

PRINCIPLES OF LAW

Claimant carries the burden of proof – a preponderance of the credible evidence that a party's position is more probably true than not true – and the trier of fact shall consider the whole record.[14] The standard of proof in workers compensation matters is not based on certainty; the standard of proof is based on probability, a lower standard.[15]

K.S.A. 2010 Supp. 44-510k(a) states:

> At any time after the entry of an award for compensation, the employee may make application for a hearing . . . . The administrative law judge can make an award for further medical care if the administrative law judge finds that the care is necessary to cure or relieve the effects of the accidental injury which was the subject of the underlying award. No post-award benefits shall be ordered without giving all parties to the award the opportunity to present evidence, including taking testimony on any disputed matters. A finding with regard to a disputed issue shall be subject to a full review by the board under subsection (b) of K.S.A. 44-551 and amendments thereto. Any action of the board pursuant to post-award orders shall be subject to review under K.S.A. 44-556 and amendments thereto.

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[12] *Grissom v. TSW Products Co., Inc.*, No. 1,045,317, 2014 WL 517209 (Kan. WCAB Jan. 2, 2014) and *Jardan v. Walmart*, No. 1,048,563, 2012 WL 3279494 (Kan. WCAB July 23, 2012).

[13] ALJ Award at 3.

[14] See K.S.A. 2010 Supp. 44-501(a) and K.S.A. 2010 Supp. 44-508(g).

[15] See *Turner v. State*, No. 110,508, 2014 WL 3022644 (Kansas Court of Appeals unpublished opinion filed June 27, 2014).

ANALYSIS

Hydrocodone relieves the effects of claimant's September 13, 2010 accidental injury.

Claimant proved his current need for hydrocodone is due to his accidental work injury and such medication relieves the effects of such injury.

Respondent argues that because claimant's medication use, before and after his injury was similar, if not identical, it is being required to pay for prescriptions related to his preexisting condition. While claimant's hydrocodone prescriptions have remained the same before and after his 2010 accident, it does not follow that he is now getting such medication for his low back and not his injured feet and ankles. Based on the evidence, the Board concludes claimant's current need for opiate pain medication is largely on account of his 2010 accidental injury. Even if apportionment of claimant's medication use was possible, there is either no evidence or insufficient evidence to make such a finding.

The Board disagrees with respondent's argument that claimant must prove the accident resulted in an aggravation of his preexisting lumbar condition to make respondent liable to pay for his hydrocodone. Again, claimant's need for such medication is predicated mostly on his bilateral foot and ankle injuries.

There is ample evidence that claimant's bilateral foot condition warrants the use of narcotic pain medication:

- claimant fell directly onto his feet from a height of 15-20 feet onto concrete;
- he broke multiple bones in his feet;
- he had 13 surgeries as a result;
- he never worked again; and
- he has constant foot pain that is relieved by hydrocodone.

The Board finds fully credible the concept that a person under those facts would require ongoing pain medication. The Board comes to this conclusion despite problems with claimant's credibility which were recognized by the judge. Contrary to claimant's testimony, the Board does not find that claimant's low back complaints were non-existent when he testified at the post-award hearing or when he was seen by Dr. Pratt. That being said, there is certainly logic and common sense that a worker engaged in masonry would have less low back pain after stopping such employment. Also, it is with a jaded eye that the Board views claimant's testimony about giving away narcotic pain medication; we agree with Dr. Pratt that claimant was not necessarily a good historian about his use of medication. However, the Board has little difficulty compartmentalizing those facts away from the reality that claimant, who has what Dr. Varner terms "catastrophic foot injuries," requires hydrocodone for foot pain relief.

The medical evidence also supports the judge's decision. Dr. Varner attributes claimant's need for medication to his bilateral foot injuries, not his low back condition.

Respondent questions Dr. Varner's veracity on three fronts. First, respondent argues Dr. Varner was not credible and "blatantly false"[16] when he stated the following two sentences: "Immediately after his injury his pain management has been controlled by Kansas University Medical Center physicians. I am not aware of the medications or dosages." Respondent points out that Dr. Varner should know what *he* prescribed for claimant. The Board agrees, but Dr. Varner stated he did not know the medications or dosages issued by doctors *at the Kansas University Medical Center.*

Second, respondent argues Dr. Varner is incorrect that claimant's low back was no longer a factor in his pain management. To a large part, the Board agrees with respondent's argument. We find claimant's low back is better after having not worked as a mason subsequent to his work injury, but his back complaints never dissipated. Nonetheless, Dr. Varner's opinion that claimant needs narcotic medication for his disabling foot injuries is valid.

Third, respondent contends Dr. Varner possibly cannot give a credible or objective opinion because he is the landlord to claimant's family's farm. There is no evidence, only speculation, that Dr. Varner's credibility is impacted based on his landlord-tenant relationship with claimant or his relatives.

Regarding the other medical evidence, Drs. Fevurly and Pratt never indicated claimant's need for hydrocodone was due only to his preexisting lumbar condition. Dr. Fevurly stated claimant's need for opiate pain medication was due to chronic pain complaints that existed before and after the work injury. While the Board concludes claimant had ongoing low back pain due to his preexisting condition, there is little doubt that claimant also has chronic pain complaints relating to his feet on account of the work injury. Plainly stated, claimant's painful feet are part and parcel of his chronic pain complaints that require opiate pain medication.

The judge indicated Dr. Pratt opined claimant would need ongoing medication to address his work injuries. The Board reads Dr. Pratt's report differently. Dr. Pratt was uncertain why claimant requires ongoing medication. The doctor was uncertain if claimant needs such medication for his preexisting lumbar complaints or his bilateral lower extremity injuries. Despite Dr. Pratt's uncertainty, the greater weight of the credible evidence establishes it is more probably true than not that claimant requires hydrocodone to relieve the effects of his accidental injury. Claimant satisfied his burden of proof.

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[16] Respondent's Brief (filed Aug. 17, 2016) at 9.

CONCLUSION

Claimant requires hydrocodone to relieve the effects of his September 13, 2010 accidental injury.

AWARD

WHEREFORE, the Board affirms the July 22, 2016 Post-Award Medical Award.[17]

IT IS SO ORDERED.

Dated this _____ day of September, 2016.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

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Honorable William G. Belden

[17] As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal. Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.